UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE OF NEW YORK, *et al.*,

Plaintiffs

v.

MICROSOFT CORPORATION,

Defendant.

Civil Action No. 98-1233 (CKK)

MEMORANDUM OPINION AND ORDER

Before the Court is Microsoft's Motion to Strike Portions of the Written Direct Testimony of David Richards. Microsoft objects to portions of Mr. Richards' testimony and exhibits appended thereto on the grounds that they contain inadmissible hearsay. Although the Court has ruled orally on this motion, the Court issues this written opinion to ensure that the record accurately reflects the Court's ruling. In particular, the Court shall reiterate its ruling with regard to various documents attached to Mr. Richards' written direct testimony.

Microsoft objects to Plaintiffs' Exhibits numbered 1237, 1255, 768, 769, 759, 760, 762, 1178, 1259, and 1254. The Court will address each exhibit seriatim. For context, it is helpful to note at the outset that Mr. Richards is an employee of RealNetworks.

In simple terms, hearsay is an out-of-court statement, written or oral,[1] offered for the truth of the matter asserted therein. Fed. R. Evid. 801(c). Federal Rule of Evidence 802 provides for a general exclusion of hearsay, stating that "[h]earsay is not admissible except as provided by these

[1]"Nonverbal conduct of a person, if it is intended by the person as an assertion," can also constitute hearsay. Fed. R. Evid. 801.

rules . . . ." Fed. R. Evid. 802. As foreshadowed by Rule 802, Federal Rule of Evidence 803 provides a number of "exceptions" to the exclusion of hearsay evidence. Fed. R. Evid. 803. In this Memorandum Opinion, the Court addresses primarily documents, which by their nature are out of court written statements. As Plaintiffs appear to concede that these documents, if offered for the truth of the matter asserted therein,[2] constitute hearsay, the Court directs the majority of its attention to the various exceptions to the hearsay rule relied upon by Plaintiffs. These exceptions provide the framework for the discussion below.

Plaintiffs' Exhibit 1237 is an email written by Rob Glaser of RealNetworks. The letter recounts a meeting between Mr. Glaser and a representative of Defendant Microsoft Corporation. In his direct testimony, Mr. Richards cites to the letter to support his contention that "RealNetworks did not get out of the streaming media platform business, and thus its technology is being targeted by Microsoft." Richards Direct ¶ 59. Mr. Richards' citation to the letter provides in pertinent part: "*See also* the email, attached hereto at Tab F, in which Rob Glaser of RealNetworks describes a June 1997 meeting with Anthony Bay of Microsoft, in which Bay indicated Microsoft wanted RealNetworks to stop development of a competing media platform." *Id.* ¶ 59 and n.8. Microsoft objects to admission of the email on the grounds that the contents of the letter are being admitted for the truth of the matter asserted therein. Microsoft Mot. at 3. With regard to Microsoft's objections to this exhibit, and all of the other exhibits appended to Mr. Richards' direct, the Litigating States respond generally as follows:

[The relevant exhibits] are admissible under Rule 803, as records of regularly

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[2]The Court, of course, recognizes that Plaintiffs have offered a blanket assertion that the statements in the documents are not hearsay because the contents of the documents are not offered for the truth of the matter asserted therein. Pl. Opp'n at 3. The Court addresses this assertion as it pertains to each of the documents.

> conducted activity under subsection (6) and/or as present sense impressions under subsection (1). In the alternative, the statements are offered not merely to prove the truth of the matter asserted (Federal Rule of Evidence 801(c) ("Rule 801(c)") but rather show that such communications were made and/or motive, intent, knowledge or notice.

Pl. Opp'n at 4.

The Court first rejects the assertion that the contents of Plaintiffs' Exhibit 1237 are not offered for the truth of the matter asserted therein. As is apparent from Mr. Richards' testimony and his description of the letter, Mr. Richards is relying on the letter to establish that Microsoft, through its representative, behaved as recounted by Mr. Glaser in the email. In this regard, Mr. Richards uses the letter to lend credence to his testimony regarding the treatment of RealNetworks by Microsoft. Based upon this use, it does not appear that Mr. Glaser's "motive, intent, knowledge, or notice" is at issue in this portion of his testimony. Accordingly, the Court rejects Plaintiffs' contention that they have offered the Glaser email to establish such facts.

Addressing next Plaintiffs' assertion that the email reflects Mr. Glaser's "present sense impression," the Court notes that the email does not appear to have been composed while Mr. Glaser was "perceiving an event" or "immediately thereafter." Fed. R. Evid. 803(1). Mr. Glaser's email is dated Monday, October 6, 1997, and refers to a meeting "on Tuesday" and a "follow-on call" on Thursday. Richards Direct, Tab. F. (Pl. Ex. 1237). "The underlying theory of Exception (1) is that substantial contemporaneity of the event and the statement negate the likelihood of deliberate or conscious misrepresentation." Fed. R. Evid. 803 advisory committee's note. In light of the "underlying theory" of Exception (1), the lag time between the actual meeting and the email renders Exception (1) inapplicable.[3]

[3]Although not directly cited by Plaintiffs, it is conceivable that they intended to argue that the email's description of Mr. Bay's statements and behavior reflects "mental condition" and

Plaintiffs further contend that the letter is admissible as a "record of regularly conducted activity" pursuant to Rule 803(6). Rule 803(6) excludes from the hearsay prohibition:

> A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), Rule 902(12), or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.

Fed. R. Evid. 803(6). "The justification for this exception is that business records have a high degree of accuracy because the nation's business demands it, because the records are customarily checked for correctness, and because recordkeepers are trained in habits of precision." *United States v. Baker*, 693 F.2d 183, 188 (D.C. Cir. 1982). While Mr. Glaser's email may have been "kept in the course" of RealNetworks regularly conducted business activity, Plaintiffs have not, on the present record, established that it was the "regular practice" of RealNetworks employees to write and maintain such emails. Fed. R. Evid. 803(6). Indeed, the complete lack of information regarding the practice of composition and maintenance of such emails invokes the final clause of Rule 803(6), which permits exclusion of the evidence where "the method or circumstances of preparation indicate lack of trustworthiness." *Id.* and advisory committee's note ("Absence of routineness raises lack of motivation to be accurate."). "[T]he trial court has broad discretion in determining whether documents otherwise admissible as business records are

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thus, is admissible pursuant to Rule 803(3). Upon careful examination, however, it is apparent that this exception is not applicable. Although Rule 803(3) excepts from the hearsay exclusion in Rule 802 a "statement of the declarant's then existing state of mind," Rule 803 generally does not except "a statement of memory . . . to prove the fact remembered." It appears that Mr. Glaser's memory of the meeting with Mr. Bay is offered to prove the truth of facts Mr. Glaser remembered about the meeting.

sufficiently trustworthy." *United States v. Kim*, 595 F.2d 795, 762 (D.C. Cir. 1979) (quoting *United States v. Reese*, 561 F.2d 894, 903 n. 18 (1977)). Pursuant to this discretion, the Court declines, on this sparse record, to treat Plaintiffs' Exhibit 1237 as a trustworthy business record.[4]

Plaintiffs' Exhibit 1255 is an email authored by another RealNetworks employee. The email recounts a meeting with representatives from Sony and contains statements allegedly made by Sony, which, in turn, purport to recount statements made by Defendant Microsoft. Mr. Richards cites to the email in his written direct testimony to support his assertion that, "[a]s of early Fall 2000, Microsoft was telling content providers, like Sony, that they should use SAP to protect their valuable content and that only WMP would have access to SAP." Richards Direct ¶ 77 and n.15. The citation provides "*See* the email from Jeff Ayars of RealNetworks to Marty Roberts of RealNetworks dated October 26, 2000, attached at Tab K. States' Exhibit 1255." *Id.* n.15. Again, in light of the accompanying testimony, there is no basis for a contention that this document is offered for anything other than the truth asserted therein. As with the previous document, the record established by Mr. Richards' testimony is insufficient to support a conclusion that the email is a business record as defined in Rule 803(6). Furthermore, even if the email were admissible as a business record, the document contains second and third-hand hearsay for which Plaintiffs do not identify an applicable exception.

Plaintiffs' Exhibit 768 is an email from RealNetworks employee Snowden Armstrong.

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[4]In so concluding, the Court does not mean to imply that the email could not be shown to be a business record. Rather, the Court's conclusion is a direct result of the lack of information in Mr. Richards' testimony regarding the email. This void was not filled during oral direct, cross or redirect, nor by a written supplement to Mr. Richards' testimony. Had Mr. Richards' Written Direct Testimony included sufficient information, Plaintiffs might well have established that the email was, in fact, admissible as a business record. If viewed as a business record, it would appear that Mr. Bays statements could be treated as non-hearsay statements by a party opponent pursuant to Rule 801(d).

The email recounts a telephone conversation with Compaq and ascribes certain statements to Compaq. Mr. Richards cites to the email in support of his assertion that RealNetworks "was informed by Compaq that any deal must take this condition into account." Richards Direct ¶ 116. Mr. Richards elaborates in his citation that "Compaq's position is reflected in an email, attached at Tab M, from Snowden Armstrong of RealNetworks to Steve Banfield of RealNetworks dated July 17, 2000. States' Exhibit 768." *Id.* n.18. Once again this email constitutes hearsay within hearsay, offered for the truth of the matter asserted, namely Compaq's position. As with the other emails, on the limited record provided to the Court, the email has not been shown to be a business record and none of Plaintiffs' claimed exemptions appear to be applicable to the multiple levels of hearsay in the document.

Plaintiffs' Exhibit 769 is another email authored by Snowden Armstrong. This email consists primarily of a "forwarded" email originally authored by William Chien, an employee of Pinnacle Systems and sent in the first instance to Geoff Walker, who then forwarded the email to Snowden Armstrong. The text of the email recounts that a new agreement has been completed between unidentified parties. The email further recounts a conversation between Mr. Chien of Pinnacle Systems and Compaq representatives wherein Mr. Chien was told by Compaq representatives that they have a new "requirement" for the use of a RealNetworks product. The implication in the email is that this requirement is imposed by Compaq's contract with Microsoft. Mr. Richards cites to the email in support of his retelling of the statements allegedly made by Compaq to Pinnacle Systems. *Id.* at ¶ 117 and n. 19. The email is offered as evidence supporting Mr. Richards' testimony that "Pinnacle Systems . . . also believed that this new Windows license condition was imposed by Microsoft and specifically targeted against RealNetworks." *Id.* In this context, it appears that the email is offered to establish Pinnacle

Systems' belief about a particular fact. At first glance, such evidence of belief might be properly admissible pursuant to Rule 803(3), which permits introduction of hearsay evidence demonstrating the declarant's then-existing mental condition. Fed. R. Evid. 803(3). However, as the entire purpose of Mr. Richards' line of testimony is to establish certain actions and intentions by Defendant Microsoft, it is clear that the ultimate purpose for which Pinnacle Systems' belief is being offered, is to establish the truth of that belief. As a result, Rule 803(3) does not render the statement admissible. *See* Fed. R. Evid. 803(3) advisory committee's note ("The exclusion of 'statements of memory or belief to prove the fact remembered or believed' is necessary to avoid the virtual destruction of the hearsay rule which would otherwise result from allowing state of mind, provable by a hearsay statement, to serve as the basis for an inference of the happening of the event which produced the state of mind."). The Court further notes that, with regard to the application of Rule 803(6), even if the email was maintained by RealNetworks as a "regular practice," Plaintiffs would have to establish that it was both the regular business practice of RealNetworks to forward such emails internally, and that it was the business practice of Pinnacle Systems to compose such emails. As the Court of Appeals has explained:

> If both the source and the recorder of the information, as well as every other participant in the chain producing the record, are acting in the regular course of business, the multiple hearsay is excused by Rule 803(6). If the source of the information is an outsider, Rule 803(6) does not, by itself, permit the admission of the business record. The outsider's statement must fall within another hearsay exception to be admissible because it does not have the presumption of accuracy that statements made during the regular course of business have.

Baker, 693 F.2d at 188. On this record, Plaintiffs have failed to make a showing which satisfies this Circuit's requirements.

Plaintiffs' Exhibit 759 is a series of emails from Pamela Stone, a Compaq employee, to an employee of RealNetworks. The emails are offered to support Mr. Richards' representation

that "Compaq reiterated that the Windows license contains an 'autolaunch restriction' that effectively prohibits programs like Tinkerbell" and that "Compaq further stated that the Windows license restricted 'anything' from running in the background at the end of the IBS, so that it might even preclude Compaq from distributing its own messaging system." Richards Direct ¶¶ 120-121. Again, the purpose of Mr. Richards' testimony is to establish that Microsoft had, in fact, imposed a certain kind of licensing restriction on Compaq. Thus, the contents of the email are offered for the truth of the matter asserted. As with the other emails, the limited record presented to the Court does not establish that this form of email correspondence is a regular practice of both Compaq and RealNetworks and that such correspondence is trustworthy. Fed. R. Evid. 803(6). Moreover, Plaintiffs do not identify an applicable exemption for the third-party statements recounted in the email.

Plaintiffs' Exhibit 760 is an email from Mr. Richards addressed to another employee at RealNetworks. The email recounts a meeting between Mr. Richards and Sony. The email describes statements purportedly made by a Sony executive regarding Microsoft licenses and Mr. Richards' statements in response. The email further states that "RN and Sony signed a termsheet on 6/22/00 that included a Sony commitment to bundle RealJukebox and RealPlayer as the default media players for Sony Vaio computers." Plaintiffs' Exhibit 760. Mr. Richards cites to the email in support of his statement that "Sony signed a term sheet agreeing to include RealPlayer and RealJukebox as the default media playback software on Sony Vaio computers." Richards Direct ¶ 134. As described above, Plaintiffs have not established the requisite factual predicate in order to offer the email as a business record. As a result, in accordance with the Court's above analysis of the assertion that the RealNetworks' emails should be treated as business records, the Court concludes that this letter is inadmissible. Moreover, the Court notes

that most of the contents of the email consist of Mr. Richards' recitation of statements purportedly made by the Sony executive, by Mr. Richards' himself, and by other individuals. These retold statements constitute hearsay within hearsay for which Plaintiffs have not identified an applicable exception.

Plaintiffs' Exhibit 762 is an email composed by Maria Cantwell, a RealNetworks employee. The email recounts a conversation between Ms. Cantwell and a number of Gateway employees. The email attributes specific statements to the Gateway employees. The email is offered in conjunction with Mr. Richards' testimony that:

> RealNetworks previously encountered similar problems with other OEMs. In 1999, Gateway indicated that it was willing to sign a contract with RealNetworks on the condition that it did not prohibit installation of software that would replace the RealPlayer as the default media playback software. Gateway indicated that this requirement was a result of its relationship with Microsoft.

Richards Direct ¶ 137 and n. 25. From this context, it is apparent that the comments of the Gateway employees recounted in the email are offered to establish that Microsoft was the cause of RealNetwork's inability to enter into contracts with OEMs. Once again, Plaintiffs have failed to establish that the email is a business record. With regard to the contents of the email, Gateway's comments constitute hearsay within hearsay. While the Gateway representative's comments might be viewed as a statement of a then-existing mental condition (i.e., willingness to install RealNetworks' software), pursuant to Rule 803(3), the facts attendant to that mental condition regarding Microsoft fall outside of the exception provided in Rule 803(3). *See* 30B Michael H. Graham, *Federal Practice and Procedure* § 7044 (Interim Ed. 2000) (explaining that a trier of fact should properly consider facts attendant to a statement of mental condition only as they bear upon the declarant's state of mind, and not for the truth of the matter asserted by those accompanying facts). As the purpose of providing Gateway's state of mind is to establish

Microsoft's purportedly blameworthy role in the failure of RealNetworks' contract negotiation, in the absence of those facts, there seems to be little usefulness to the apparently admissible statement that Gateway expressed a willingness to enter into the contract. As a result, the Court concludes that the email consists primarily of hearsay within hearsay for which Plaintiffs have not offered an applicable exception.

Plaintiffs' Exhibit 1178 is a lengthy series of forwarded emails. The emails are offered in concert with Mr. Richards' testimony that "RealNetworks is aware of several exclusive contracts that Microsoft has purportedly executed or sought to enter into with ICPs." *Id.* ¶ 188 and n.27. The emails reflect an exchange between a RealNetworks employee and an ABC employee regarding Oscar.com. Plaintiffs have not established the requisite foundation that the multiple authors of these emails each composed their portion of the document in the course of regularly conducted business activity and that it was the regular practice of RealNetworks to compose such email correspondence. Fed. R. Evid. 803(6). Moreover, the multiple authors and forwarded nature of this series of emails undercuts the reliability of the information contained therein. Accordingly, the series of emails constitute hearsay for which there appears to be no applicable exception to render the statements admissible.

Plaintiffs' Exhibit 1259 appears to be a redacted email, with prior emails incorporated into its body. In its upper portion, the email consists of a purported excerpt from a New York Times article. In its lower portion, the email reflects that Mr. Glaser from RealNetworks wrote to Mr. Schuler at AOL and appears to inquire as to whether the above-quoted article was accurate. Mr. Schuler's purported response follows. Mr. Richards cites to the email in conjunction with his testimony that "[Barry] Schuler [of AOL] commented 'They want to kill you guys so badly, it is ugly . . . in the end, they looked at bundling AOL with its embedded

RealPlayer as a distribution deal for you and could not stomach it.'" Richards Direct ¶ 209 and n. 120. The email does, in fact, contain the language quoted by Mr. Richards in his testimony. When read in context, it appears that Mr. Richards' testimony is intended to establish that Microsoft's animosity toward RealNetworks led to the failure of an agreement between AOL and Microsoft. *Id.* ¶ 206-9. Thus, it appears that Mr. Richards recites Mr. Schuler's purported comments in order to establish the truth of the matters asserted therein. In this regard, Plaintiffs have offered clear hearsay within hearsay for which they identify no applicable exclusions to the prohibition on the introduction of hearsay evidence.

Finally, Plaintiffs' Exhibit 1254 is a copy of an article which appeared in the Wall Street Journal on March 19, 1999. The article quotes Microsoft employee Yusuf Mehdi as stating, "Media has become a seamless part of the browsing experience. We're going to make it stunningly simple." Plaintiffs respond to Defendant's hearsay objection specifically with regard to this exhibit. Plaintiffs state in full that the exhibit "is not being offered 'to prove the truth of the matter asserted' but rather to show that the statement was made by Mr. Mehdi." Pl. Opp'n at 4. Plaintiffs' purported justification misses the point. "The article . . . is hearsay: an out-of-court statement offered to prove the truth of its contents–to prove, that is, that [Mr. Mehdi] made the comments attributed to [him]." *Eisenstadt v. Centel Corp.*, 113 F.3d 738, 742 (7th Cir. 1997) (Posner, C.J.). In this light, the newspaper article is clearly inadmissible hearsay.

Based on the foregoing, and as recounted orally from the bench, the Court determines that each of the above-described exhibits constitutes inadmissible hearsay and, pursuant to Defendant Microsoft's objections, the Court shall not rely upon the inadmissible hearsay contents of these exhibits. As an aside, the Court notes that, without doubt, other hearsay evidence has been presented by the parties, and in the absence of objections, has been admitted into evidence. The

Court regards such action as proper given that "[i]n this country the general rule supported by the overwhelming weight of authority is that where ordinarily inadmissible hearsay evidence is admitted into evidence without objection it may properly be considered and accorded its natural probative effect, as if it were in law admissible." *United States v. Lynch*, 499 F.2d 1011, 1038 (D.C. Cir. 1974) (MacKinnon, J., dissenting) (citing, *inter alia*, *Spiller v. Atchison, T. & S.F. Ry. Co.*, 253 U.S. 117 (1920); *Rowland v. Boyle*, 244 U.S. 106 (1917); *Diaz v. United States*, 223 U.S. 442, 450 (1912)); *see also United States v. Campbell*, 233 F.3d 1286 (11th Cir. 2000) ("[H]earsay, like any other evidence admitted without objection, can be used for any purpose and may be the subject of fair comment."); *Gochicoa v. Johnson*, 118 F.3d 440, 448 n.7 (5th Cir. 1997) ("Otherwise inadmissible hearsay admitted without objection is treated the same as any other evidence, and may be considered by the [finder of fact] . . . .").

Accordingly, it is this 12th day of April, 2002, hereby

ORDERED that the Court's oral ruling with regard to the above-described contents of Plaintiffs' Exhibits numbered 759, 760, 762, 768, 769, 1178, 1237, 1254, 1255, and 1259 is SUPPLEMENTED.

SO ORDERED.

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COLLEEN KOLLAR-KOTELLY
United States District Judge